Filed 2/9/16 Exigen Properties v. Genesys Telecommunications Laboratories CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

EXIGEN PROPERTIES, INC., et al., Plaintiffs and Respondents, v. GENESYS TELECOMMUNICATIONS LABORATORIES, INC., Defendant and Appellant.	A140081 (San Mateo County Super. Ct. No. CIV 481741)

This appeal arises out of the continuing efforts of defendant Genesys Telecommunications Laboratories, Inc. (Genesys) to compel arbitration of trade secret theft and defamation claims asserted against it. In an earlier appeal from an order denying arbitration, we held that the claims fell within the scope of a broadly worded arbitration clause contained in a strategic partnership agreement, at least as to the signatories to that agreement. We reversed the order and remanded the matter to the trial court to consider whether equitable principles justify compelling plaintiffs that did not sign the strategic partnership agreement to arbitrate their dispute with Genesys.

Upon remand, the trial court concluded Genesys had failed to set forth sufficient facts under either an equitable estoppel or alter ego theory to justify compelling nonsignatory plaintiffs to arbitrate their claims. Based upon the court's conclusion that there was a possibility of conflicting legal and factual rulings if only the signatory plaintiffs were ordered to arbitrate their dispute with Genesys, the court exercised its

discretion under Code of Civil Procedure[1] section 1281.2, subdivision (c) (hereafter section 1281.2(c)) and ordered all the parties to litigate their claims in the judicial forum, regardless of whether they are signatories to the agreement containing the arbitration clause.

In this appeal, Genesys argues that the court erred in concluding that the facts it presented are insufficient to create an equitable estoppel compelling nonsignatory plaintiffs to arbitrate. It also contends it proffered facts sufficient to establish that the nonsignatory plaintiffs are the alter egos of the signatory plaintiffs. Finally, it urges that the trial court erred in applying section 1281.2(c) and ordering all parties to litigate their claims in court. Applying independent review to the facts before the trial court, we agree with Genesys that the nonsignatory plaintiffs are equitably estopped from refusing to arbitrate. Because the nonsignatory plaintiffs received direct and substantial benefits from the strategic partnership agreement, equitable principles dictate that they cannot now disavow the portion of that agreement requiring the parties to submit their disputes to arbitration. Accordingly, we shall reverse the challenged order and compel all parties to arbitrate their claims.

FACTUAL AND PROCEDURAL BACKGROUND

In this court's opinion in the earlier appeal (*Exigen Properties, Inc., et al. v. Genesys Telecommunications Laboratories, Inc.* (June 29, 2012, A129609) [nonpub. opn.]), we set forth the factual and procedural history of this matter in detail. It is unnecessary to recount that history at length. We summarize the background of the dispute below and supplement it with a history of the events that have transpired since the earlier appeal.

The Strategic Partnership Agreement (SPA)

Genesys is a telecommunications software company. Its software products help integrate customer service call centers and computer systems. In December 2000,

[1] All further statutory references are to the Code of Civil Procedure unless otherwise specified.

Genesys and Exigen, Ltd. entered into a contract referred to as the Strategic Partnership Agreement (SPA). Exigen, Ltd. is one of 14 plaintiffs in this action that are related or affiliated business entities.[2] We shall refer to the plaintiffs below collectively as "Exigen" or "Exigen plaintiffs" unless it is necessary to identify a particular plaintiff or set of plaintiffs with greater specificity. Like Genesys, the Exigen plaintiffs are described as telecommunications software companies.

The SPA sets forth the parties' intention to establish a "multi-dimensional relationship" to resell and distribute the products of each of the parties. It effectively grants non-exclusive, non-transferable licenses to distribute and sublicense copies of each other's software, either as stand-alone products or bundled with other products. The SPA includes an exhibit listing the generally available software products of both Genesys and Exigen, Ltd. that are covered by the agreement. Pursuant to the SPA, each party agreed to provide sales and technical training to the other party, to identify mutually beneficial business opportunities, and to use "commercially reasonable efforts to market, distribute and support" each other's products. The SPA includes a confidentiality provision requiring each party to maintain in confidence all information designated as confidential by the other party. The confidentiality provisions also prohibit the parties from reverse-engineering any software or other items containing confidential information.

In section 16 of the SPA, the parties agreed to submit "[a]ll disputes or controversy arising out of or in connection with or related to [the SPA]" to arbitration if the parties' respective executives failed to settle their differences amicably. Any arbitration would be conducted in accordance with the commercial rules of the American

[2]As set forth in the operative second amended complaint, the plaintiffs in the action below are: (1) Exigen Properties, Inc., (2) Exigen Services, Ltd., (3) Exigen Services (USA), Inc., (4) Exigen (USA), Inc., (5) Exigen Ltd., (6) Exigen (Canada), Inc., (7) Exigen Latvia (SWH Tehnologija), (8) Exigen Europe B.V., (9) Exigen Deutschland GmbH, (10) Exigen Services Europe Limited, (11) Exigen East B.V., (12) Exigen Services Pacific PTY Limited, (13) Exigen Services, LLC, and (14) Foreign Enterprise Exigen Services.

Arbitration Association then in effect. The SPA provides that it is governed by California law.

The parties amended the SPA four times. In the first amendment, the parties replaced "Exigen, Ltd." with "Exigen (USA), Inc. and its subsidiaries and Exigen Properties, Inc." The three subsequent amendments involved these same Exigen entities. Of the 14 Exigen plaintiffs currently named in the operative complaint, only two are signatories to the SPA—Exigen (USA), Inc. and Exigen Properties, Inc. We shall refer to these two parties as the signatory Exigen plaintiffs. The remaining 12 plaintiffs shall be referred to as the nonsignatory Exigen plaintiffs.

The Deutsche Telekom Deal

Deutsche Telekom is Genesys's largest customer. Genesys's largest implementation of Exigen's product resulted from a 2004 transaction with Deutsche Telekom. In 2007, Deutsche Telekom sought to restructure its customer services processes and software. Genesys worked on restructuring the Deutsche Telekom deal and sent engineers to Exigen Service (USA), Inc.'s San Francisco office in December 2007 to understand how Exigen's trade secrets functioned in order to better serve the needs of Deutsche Telekom and other customers. After Genesys and Deutsche Telekom had reached an agreement regarding the structure of the parties' deal, the CEO of Genesys contacted Exigen to seek a substantial, 15 percent pricing discount on Exigen products that were part of the proposed deal. Exigen refused to discount its products.

After unsuccessfully seeking a discount from Exigen, Genesys proceeded with the restructured Deutsche Telekom deal using its own application hosting technology in place of Exigen's product. According to Exigen, Genesys developed products that were competitive with Exigen's product, purportedly using Exigen's trade secrets. Exigen alleges that the purpose of the purported trade secret theft was for Genesys to compete directly with Exigen's product. Exigen also alleges it first learned in March 2008 that Genesys was engaging in a worldwide campaign to disparage Exigen's products and create the false impression that Exigen's application hosting technology could not perform in large platform environments.

Exigen Sues Genesys for Trade Secret Theft and Defamation

In its original complaint against Genesys, 12 of the 14 current Exigen plaintiffs asserted causes of action for unfair competition (Bus. & Prof. Code, § 17200), trade libel, defamation, aiding and abetting misappropriation of trade secrets, and unjust enrichment. Exigen premised the causes of action for unfair competition, trade libel, and defamation upon allegations that Genesys had made false or misleading statements about Exigen products. The causes of action for unjust enrichment and aiding and abetting misappropriation of trade secrets were based upon allegations that Genesys had misappropriated and used Exigen's trade secrets and other confidential and proprietary information maintained on Exigen's servers in San Francisco. The original complaint devoted an entire section to the partnership among the parties, including an extensive discussion of the SPA.

Genesys Unsuccessfully Moves to Compel Arbitration

Genesys moved to compel arbitration, arguing that all of Exigen's claims have their roots in the SPA. At the hearing on the motion, the trial court expressed the view that it had no problem ordering the signatory Exigen plaintiffs to arbitration under the "all encompassing" arbitration clause contained in the SPA. However, the court was hesitant to compel nonsignatory Exigen plaintiffs to arbitrate under the SPA and denied the motion without prejudice to permit limited discovery concerning whether equitable grounds may exist to compel the nonsignatory Exigen plaintiffs to arbitrate their claims.

During the limited discovery phase, Exigen filed a first amended complaint adding two more Exigen entities as plaintiffs. Unlike the original complaint, which described the SPA as a worldwide strategic, multi-dimensional partnership, the first amended complaint characterized the SPA as an agreement governing specific licensing agreements. The first amended complaint also expressly alleged that none of the causes of action arose out of or were related to the SPA. After the court sustained a demurrer with leave to amend, Exigen filed the operative second amended complaint, which contains a separate cause of action for trade secret misappropriation but otherwise includes the same causes of action contained in the original and first amended

complaints. The second amended complaint also contains the allegation that the SPA is irrelevant to the parties' dispute.

Following the completion of limited discovery, Genesys renewed its motion to compel arbitration. The judge who heard the renewed motion to compel was different from the judge who heard the initial motion. The court denied the renewed motion, reasoning that Exigen's causes of action did not arise under the SPA, which the court characterized as a licensing agreement with a limited scope. The court based its decision on the threshold issue of the arbitrability of the claims under the SPA and did not reach the question of whether the nonsignatory Exigen plaintiffs could be compelled to arbitrate. Genesys appealed.

Reversal and Remand

This court reversed the order denying the motion to compel arbitration. (*Exigen Properties, Inc. et al. v. Genesys Telecommunications Laboratories, Inc.* (June 29, 2012, A129609) [nonpub. opn].) Our analysis was limited to the threshold question of whether the parties to the SPA agreed to arbitrate the claims described in the second amended complaint.

Because the SPA's arbitration provision extended to all disputes "arising out of or in connection with or related to" the SPA, we concluded the provision was a broad arbitration clause that would encompass tort claims as long as any such claims had their roots in the contractual relationship. We held that the "dispute is plainly rooted in the business relationship created by the SPA," reasoning that "it was the relationship created by the SPA that gave rise to the opportunity to purportedly misappropriate Exigen's trade secrets and to allegedly defame Exigen's products after Exigen refused an opportunity to bundle its products with Genesys at a discounted rate." We also rejected the claim that the SPA was a mere licensing agreement with limited scope and instead described it as "the overarching framework for the parties' business relationship." We rejected Exigen's attempt to discount the significance of the SPA in its amended complaints after it had emphasized the SPA's role in its original complaint, stating that "Exigen could not

simply plead around its earlier admissions supporting arbitration by inexplicably recharacterizing the nature of the dispute."

Our conclusion that the claims contained in the second amended complaint fall within the scope of the SPA's broadly worded arbitration clause was limited in application to the signatories to that agreement. We remanded the matter to the trial court to assess whether equitable principles of estoppel or alter ego provide a basis to compel the nonsignatory Exigen plaintiffs to arbitrate pursuant to an arbitration clause contained in an agreement they did not sign. We also noted that, "depending upon the court's resolution of this issue, the court may be vested with discretion [under section 1281.2(c)] to take a variety of courses of action, including dismissing or staying the trial court action, and ordering some, all, or none of the parties or claims into arbitration."

Proceedings Upon Remand

Following the issuance of the remittitur, Genesys filed its second renewed motion to compel arbitration. The motion focused on (1) whether the nonsignatory Exigen plaintiffs could be compelled to arbitrate the claims alleged in the second amended complaint, and (2) the appropriate disposition under section 1281.2(c) if the nonsignatory Exigen plaintiffs could not be required to arbitrate.

At the hearing on the matter, the trial court indicated in a tentative ruling that Genesys could not compel the nonsignatory Exigen plaintiffs to arbitrate. The court ordered the parties to submit letter briefs relating to the burden of proof under section 1281.2(c) to establish a possibility of conflicting rulings on issues of law or fact common to the arbitration and a pending court action. In its letter brief, Genesys addressed the burden of proof issue but also concluded by noting "for the record" that section 1281.2(c) is inapplicable because the arbitration is an "international commercial arbitration." (See § 1297.17 [sections 1280 to 1284.2 superseded in international commercial arbitrations].) Genesys argued that the arbitration qualifies as an international commercial arbitration because one of the signatory Exigen plaintiffs, Exigen Properties, Inc., has its principal place of business in the British Virgin Islands.

The court denied the renewed motion to compel arbitration. In its written order denying the motion, the court explained that the facts Genesys had marshaled fell far short of establishing that the 12 nonsignatory Exigen plaintiffs were alter egos of the 2 signatory Exigen plaintiffs. With regard to the issue of equitable estoppel, the court concluded that the claims in the second amended complaint were not dependent upon or inextricably intertwined with the obligations imposed by the SPA. The court observed that, for the most part, Genesys was relying upon statements in our appellate opinion as the basis for imposing equitable estoppel. But the court noted that the standard for assessing whether a claim falls within a broad contractual arbitration provision is different from the equitable estoppel standard for assessing whether a claim is sufficiently intertwined with a contract containing an arbitration clause.

The court concluded that section 1281.2(c) applied because there was a possibility of conflicting rulings on issues of law or fact common to both the arbitration and the court action. Accordingly, the court ordered all parties, including the signatory Exigen plaintiffs who had agreed to arbitrate their dispute with Genesys, to litigate their claims in court. In response to Genesys's claim regarding international arbitration, the court concluded that any rights Genesys may have had based on provisions governing international commercial disputes (§ 1297.11 et seq.) had long been waived. Genesys timely appealed the court's order.

DISCUSSION

1. *Standard of Review*

We apply the substantial evidence standard of review to an order denying a motion to compel arbitration if the trial court's decision turns on the resolution of disputed facts. (*Norcal Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 71.) Where the facts are undisputed, our review is de novo. (*Ibid.*)

Exigen contends the substantial evidence standard of review applies because there are disputes of fact. We disagree. Although the court was presented with an ample factual record, Exigen fails to identify which material facts are actually in dispute. The dispute is over the legal significance of the undisputed facts presented to the court.

Accordingly, we apply de novo review to the court's decision not to compel the nonsignatory Exigen plaintiffs to arbitrate. (See *Norcal Mutual Ins. Co. v. Newton, supra,* 84 Cal.App.4th at p. 72; *UCFW & Employers Benefit Trust v. Sutter Health* (2015) 241 Cal.App.4th 909, 920 (*UEBT*) [question of whether arbitration agreement is operative against nonsignatory is reviewed de novo]; *Suh v. Superior Court* (2010) 181 Cal.App.4th 1504, 1512 [same].)

Exigen also argues that we must apply the doctrine of implied findings and presume that the trial court made all necessary findings supported by substantial evidence in light of Genesys's purported failure to properly request a statement of decision. (*Acquire II, Ltd. v. Colton Real Estate Group* (2013) 213 Cal.App.4th 959, 970.) The principle Exigen cites might have some application here if the applicable standard of review afforded some deference to the trial court's ruling. However, because our review is de novo, it is immaterial that the trial court did not prepare a statement of decision or that Genesys failed to properly request one.

2. *Equitable Estoppel as Basis to Compel Nonsignatory Exigen Plaintiffs to Arbitrate*

"Both the Federal Arbitration Act (9 U.S.C. § 1 et seq.) and the California Arbitration Act (Code Civ. Proc., § 1280 et seq.) favor enforcement of valid arbitration agreements."[3] (*UEBT, supra,* 241 Cal.App.4th at p. 918, fn. omitted.) Arbitration is a

[3]The parties do not specifically address whether our inquiry is guided by California or federal law, insofar as the Federal Arbitration Act (9 U.S.C. § 1 et seq.) may apply to the SPA. Because the SPA includes a choice of law provision in which the parties agreed to be bound by California law, the Federal Arbitration Act is inapplicable. (See *Acquire II, Ltd. v. Colton Real Estate Group, supra,* 213 Cal.App.4th at p. 968.) As a practical matter, California law and federal law take a similar approach to the issue of whether equitable principles may justify compelling a nonsignatory to arbitrate a dispute. (See *Rowe v. Exline* (2007) 153 Cal.App.4th 1276, 1288; *Suh v. Superior Court, supra,* 181 Cal.App.4th at p. 1513 [listing equitable grounds such as estoppel and alter ego among six theories that support compelling a nonsignatory to arbitrate].) These principles do not derive from state or federal statutes, but instead flow from concerns for equity that are found in both California and federal law. (See *Rowe v. Exline, supra,* at p. 1288.) Consequently, while we apply California law, federal cases offer persuasive

matter of contract, however, and the policy favoring arbitration does not displace the need for a consensual agreement to arbitrate a dispute. (*Avery v. Integrated Healthcare Holdings, Inc.* (2013) 218 Cal.App.4th 50, 59.) Nevertheless, there are circumstances under which nonsignatories to an arbitration agreement can be compelled to arbitrate, including incorporation by reference, assumption, agency, veil-piercing or alter ego, estoppel, and third-party beneficiary. (*Suh v. Superior Court, supra,* 181 Cal.App.4th at p. 1513.)

In this case, Genesys relies on equitable estoppel and alter ego principles as the basis for compelling the nonsignatory Exigen plaintiffs to arbitrate their dispute. As explained below, we agree with Genesys that the application of equitable estoppel principles to the facts here justify compelling the nonsignatory Exigen plaintiffs to arbitrate their dispute with Genesys.

"Equitable estoppel precludes a party from asserting rights 'he otherwise would have had against another' when his own conduct renders assertions of those rights contrary to equity." (*International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH* (4th Cir. 2000) 206 F.3d 411, 417–418.) " '[T]he linchpin for equitable estoppel is equity—fairness.' " (*Goldman v. KPMG, LLP* (2009) 173 Cal.App.4th 209, 220.) "The doctrine thus prevents a party from playing fast and loose with its commitment to arbitrate, honoring it when advantageous and circumventing it to gain undue advantage." (*Metalclad Corp. v. Ventura Environmental Organizational Partnership* (2003) 109 Cal.App.4th 1705, 1713.)

As applied in the arbitration context, equitable estoppel may bind a nonsignatory to arbitrate if the nonsignatory embraces the agreement containing the arbitration clause and directly benefits from the agreement. (*Bouriez v. Carnegie Mellon Univ.* (3d Cir. 2004) 359 F.3d 292, 295.) "A non-signatory can 'embrace' a contract containing an arbitration clause in two ways: (1) by knowingly seeking and obtaining 'direct benefits'

---

authority to the extent they turn on equitable considerations in deciding whether to compel a nonsignatory to arbitrate.

from that contract; or (2) by seeking to enforce the terms of that contract or asserting claims that must be determined by reference to that contract." (*Noble Drilling Servs. v. Certex USA, Inc.* (5th Cir. 2010) 620 F.3d 469, 473.) These two distinct aspects of equitable estoppel as applied to arbitration—(1) obtaining direct benefits from a contract and (2) seeking to enforce the contract terms—have been cited approvingly by California courts. (See, e.g., *JSM Tuscany, LLC v. Superior Court* (2011) 193 Cal.App.4th 1222, 1237 [describing nonsignatory who relies on contract terms in asserting claims]; *Crowley Maritime Corp. v. Boston Old Colony Ins. Co.* (2008) 158 Cal.App.4th 1061, 1070–1071 [describing nonsignatory who receives a direct benefit under a contract containing an arbitration clause]; *Boucher v. Alliance Title Co., Inc.* (2005) 127 Cal.App.4th 262, 269 [same].)

Before a nonsignatory may be compelled to arbitrate on the ground the nonsignatory seeks to enforce the contract terms, it must be established that the causes of action asserted in the complaint are " ' " 'intimately founded in and intertwined with the underlying contract obligations.' " ' " (*Boucher v. Alliance Title Co.,Inc., supra,* 127 Cal.App.4th at p. 271; accord, *JSM Tuscany, LLC v. Superior Court, supra,* 193 Cal.App.4th at p. 1237.) It is not enough for the claims to merely have some relation to an agreement containing an arbitration clause; the claims must *rely* on the terms of the written agreement. (*Goldman v. KPMG, LLP, supra,* 173 Cal.App.4th at p. 218.)

Exigen contends that its causes of action do not rely on the terms of the SPA and are not inextricably interwined with that agreement. Indeed, Genesys's duty to refrain from stealing trade secrets and defaming any of the nonsignatory Exigen plaintiffs is not dependent upon or inextricably intertwined with the SPA. While the SPA may give rise to a separate, contractual duty owed to the signatory Exigen plaintiffs, the duty owed by Genesys to the nonsignatory Exigen plaintiffs exists independently of the SPA and does not depend upon that agreement for its existence. The nonsignatory Exigen plaintiffs could pursue their business tort and statutory claims even if the SPA were invalid or did not exist at all. Consequently, we tend to agree with Exigen that there are insufficient

grounds to compel the nonsignatory Exigen plaintiffs to arbitrate on the ground that they are seeking to enforce the terms of the SPA.

We reach a different conclusion, however, when we apply the other theory of equitable estoppel employed in the arbitration context—direct benefits estoppel—to the facts of this case. Direct benefits estoppel applies when nonsignatories embrace the contract and its benefits during the life of the contract but then disavow the arbitration clause in the contract when litigation arises. (*Noble Drilling Servs. v. Certex USA, Inc., supra,* 620 F.3d at p. 473.) The focus is not upon whether the nonsignatory is suing under contract containing the arbitration clause, but instead is upon "whether the evidence showed that the nonsignatory received direct and substantial benefits from that agreement." (*Wood v. PennTex Res., L.P.* (S.D. Tex. 2006) 458 F.Supp.2d 355, 368.) Under direct benefits estoppel, it is unnecessary to establish that the nonsignatory is seeking to enforce the terms of the contract containing the arbitration clause or that the nonsignatory's claims are intimately founded in or intertwined with the contract.[4] (See *id.* at p. 369 [court may compel nonsignatory to arbitrate under direct benefits estoppel theory even if suit is not based on contract containing arbitration clause].) Rather, once it is established that the nonsignatory received direct and substantial benefits from the contract, the question of whether causes of action asserted by the nonsignatory are arbitrable turns upon the language of the contract's arbitration clause. (Cf. *Antonio Leonard TNT Prods., LLC v. Goossen-Tutor Promotions, LLC* (S.D. Tex. 2014) 47 F.Supp.3d 500, 519–520 [after concluding that nonsignatory was bound to arbitrate under direct benefits theory, court proceeded to examine whether arbitration clause was narrow or broad]; *Wood v. PennTex Resources, L.P., supra,* 458 F.Supp.2d at pp. 373–375 [same].)

[4]If it were the case that a nonsignatory who receives direct benefits from a contract containing an arbitration clause could not be compelled to arbitrate unless the nonsignatory's claims relied on the contract, then there would be no reason to consider direct benefits estoppel as a theory of equitable estoppel separate from one premised on seeking to enforce the terms of the contract.

A number of cases address what constitutes a "direct and substantial" benefit sufficient to require a nonsignatory to arbitrate on the basis of direct benefits estoppel. (See *Antonio Leonard TNT Prods., LLC v. Goossen-Tutor Promotions, LLC, supra,* 47 F.Supp.3d at pp. 515–518 [summarizing cases evaluating what constitutes "direct benefit" triggering estoppel].) In one such case, *American Bureau of Shipping v. Tencara Shipyard S.P.A.* (2d Cir. 1999) 170 F.3d 349, 351, a "classification society" that classified ships sought to compel a ship's owners to arbitrate, even though the owners were not a party to the contract between the classification society and the ship's builder that contained the arbitration clause. Ship classification refers to the process by which a vessel is deemed to comply with safety regulations and is considered seaworthy. (*Ibid.*) Rejecting the trial court's conclusion that any benefits the owners received from the classification contract were indirect, a federal appellate court held that the owners were estopped to deny their obligation to arbitrate because they received direct benefits consisting of (1) significantly lower insurance rates on the vessel and (2) the ability to sail under the French flag. (*Id.* at p. 353.) These benefits were not merely indirect or incidental, according to the court, because registration of the vessel "would have been practically impossible" without the vessel's classification. (*Ibid.*)

In a case decided by Division Two of this court, *Norcal Mutual Ins. Co. v. Newton, supra,* 84 Cal.App.4th 64, 66, an insurance company succeeded in compelling the spouse of its insured to arbitrate a dispute under a medical malpractice insurance policy, even though the spouse was not a party to the policy. The court reasoned that the spouse had accepted the benefits of the policy by receiving legal representation in a lawsuit in which both the insured and the spouse were named as defendants. (*Id.* at p. 82.) Among other things, the appellate court rejected the argument that a nonsignatory must receive *all* the benefits of the contract containing the arbitration clause in order to be bound by that clause. (*Ibid.*)

In contrast to cases finding that a nonsignatory received benefits from a contract sufficient to invoke direct benefits estoppel, a federal court of appeals found that a benefit was too indirect to give rise to an estoppel in *Thomson-CSF, S.A. v. American Arbitration*

Ass'n. (2d Cir. 1995) 64 F.3d 773, 778–779. There, the parties to a contract containing an arbitration clause agreed to an exclusive supply arrangement in which one party—a manufacturer of flight simulators—agreed to buy certain imaging equipment from the other party, which in turn was bound to sell that imaging equipment only to the other contracting party. (*Id.* at pp. 775, 778.) A competitor acquired the flight simulator company but took the position that, as a nonsignatory to the contract at issue, it was not bound to purchase the imaging equipment offered by the signatory to the contract. (*Id.* at p. 775.) The signatory that manufactured imaging equipment sought to compel the nonsignatory to arbitrate, claiming that the nonsignatory had benefited from the contract by eliminating it as a competitor. (*Id.* at p. 779.) The appellate court disagreed, concluding that the indirect benefit enjoyed by the nonsignatory was not the sort of benefit "envisioned as the basis for stopping a nonsignatory from avoiding arbitration." (*Ibid.*) According to the court, the benefit of eliminating competition derived from the nonsignatory's acquisition of the contracting party and not from the contract itself. (*Ibid.*)

The court reached a similar conclusion with respect to an asserted benefit enjoyed by a nonsignatory in *Zurich American Insurance Co. v. Watts Industries* (7th Cir. 2005) 417 F.3d 682, on which Exigen relies. There, an insurance company entered into two separate types of contract with the insured. One contract type was the insurance policy itself, which did not contain an arbitration clause. The other contract type governed the deductible to be paid by the insured and included a broad arbitration clause. (*Id.* at p. 684.) After the insured sued the insurance company under the insurance policy, the insurer sought to compel arbitration based upon the broad arbitration clause contained in the contracts governing the deductible. (*Id.* at p. 685.) The insurer asserted that the insured was equitably estopped from avoiding arbitration because it had benefited from the contract that included an arbitration clause. (*Id.* at p. 688.) The appellate court disagreed, concluding that even if the insured had benefitted from the "deductible agreements by paying lower insurance premiums based on the deductibles, this benefit is too attenuated and indirect to force arbitration under an estoppel theory." (*Ibid.*)

In a recent case, *UEBT, supra,* 241 Cal.App.4th at page 931, Division Five of this court rejected a contention that a nonsignatory had accepted the benefits of a contract containing an arbitration clause. In *UEBT*, the nonsignatory (UEBT) was a health care employee benefits trust that contracted with a network vendor (Blue Shield), which in turn had a separate provider contract with a health care provider (Sutter Health). (*Id.* at p. 914.) UEBT sued Sutter Health, claiming that provider contracts between Sutter Health and network vendors, such as Blue Shield, were anticompetitive and caused UEBT and similarly situated entities to overpay for health care services. (*Ibid.*) Sutter sought to compel arbitration under the provider contract even though UEBT was not a signatory, suggesting that UEBT had " 'accept[ed] the benefits' " of the provider contract by enjoying discounted rates negotiated by Blue Shield. (*Id.* at p. 931.) The appellate court rejected the contention, concluding that the purported benefit UEBT enjoyed resulted directly from its contract with Blue Shield, in which UEBT paid consideration for access to Blue Shield's discounted provider rates. (*Ibid.*) Insofar as UEBT benefited from reduced rates Blue Shield had negotiated with health care providers such as Sutter Health, the benefit was too indirect to compel arbitration on an equitable estoppel theory.

The cases addressing the doctrine of direct benefits estoppel involve such disparate fact patterns and circumstances that it would be difficult, if not impossible, to fashion an all-purpose, comprehensive definition of what constitutes a direct benefit sufficient to invoke the doctrine. However, at a minimum, the inquiry must focus on whether the asserted benefit derives directly from the terms of the contract or is simply a by-product or consequence of the contract's performance.

Here, there is a compelling case to invoke the direct benefits estoppel doctrine under any conceivable articulation of the theory. As we concluded in the previous appeal, the SPA "established a framework for a worldwide partnership" that provided "the overarching framework for the parties' business relationship." The benefits under the SPA included an agreement to jointly market and promote each other's products, give each other pricing discounts, and maintain each other's trade secrets in confidence. The

evidence before the trial court established that the nonsignatory Exigen plaintiffs enjoyed these benefits under the SPA.

At the deposition of Exigen's designated most knowledgeable person, Exigen's designee testified that Exigen, Ltd. signed the SPA "[t]o develop business for itself and the entities that exist and existed at the time within the Exigen group of companies ultimately to derive financial benefit, revenue from customers, product revenue and so forth." By "entities," Exigen's designee confirmed that he meant "Exigen entities." Whether a particular Exigen entity was a signatory to the SPA was unimportant because, as Exigen's designee testified, "different entities inherited the various benefits that were created at the time of this particular contract signing . . . ." Exigen's designee clarified that by "various benefits" of "this particular contract," he meant "benefits of the [SPA]."

Genesys set forth evidence establishing how particular nonsignatory Exigen plaintiffs benefited directly from the SPA. For example, Exigen (Canada), Inc. licensed software from Genesys. Documents produced by Exigen (Canada), Inc. describe technology "jointly developed by Exigen and Genesys" that was the subject of an amendment to the SPA. Similarly, Exigen Deutschland GmbH helped deploy the "Universal Workflow Solution," which included Genesys components and is the subject of an amendment to the SPA.

These specific examples are not simply isolated instances of nonsignatory Exigen plaintiffs receiving direct benefits from the SPA. As the record reflects, the services, products, and alleged trade secrets of the various Exigen entities were integrated and interrelated, with several entities within the Exigen group of companies having an interest in the same alleged trade secrets. Exigen's confidential disclosure of its alleged trade secrets is a single document submitted on behalf of all signatory and nonsignatory Exigen plaintiffs, with no differentiation as to which entity holds which asserted trade secret. The disclosure identifies the "Universal Workflow Solution" as "the product developed jointly by Exigen and Genesys, using [a] set of technologies from both parties."

In sum, the benefits that Genesys was to provide under the SPA extended to each of the Exigen entities, without regard to whether the particular entity was a signatory to

the SPA. The benefits are "direct and substantial" because they constitute the same types of benefits enjoyed by the signatories to the contract—i.e., joint marketing and promotion of products, mutual pricing discounts, and maintenance of shared trade secrets. These benefits cannot be characterized either as tangential to the SPA or as simple by-products of the parties' performance of the SPA. Instead, the benefits derive directly from the terms of the SPA.

Exigen claims that direct benefits estoppel does not apply here, relying on a case in which an appellate court found that a nonsignatory employee was not compelled to arbitrate his employment dispute because he was already entitled under California law to any benefits (such as paid vacation) that he purportedly received under the contract containing an arbitration provision. (See *Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 806.) Exigen argues that its common law and statutory claims exist independently of the SPA, and therefore the SPA provides the nonsignatory Exigen plaintiffs no direct benefit beyond that already afforded under California law. We disagree. The argument conflates direct benefits estoppel with the form of equitable estoppel requiring a showing that the causes of action are intimately intertwined with and dependent upon the contract containing the arbitration clause. No such showing is required to invoke direct benefits estoppel. In any event, the nonsignatory Exigen plaintiffs received direct benefits from the SPA that they were not already entitled to receive under California law, such as joint development and marketing of products with Genesys.

We conclude that the nonsignatory Exigen plaintiffs are equitably estopped from refusing to comply with the arbitration provision in the SPA in view of the direct benefits they received from the SPA. It would be profoundly inequitable to permit the nonsignatory Exigen plaintiffs to accept the benefits of the SPA and then deny the obligation under the SPA to arbitrate disputes that fall within that agreement's arbitration clause.

The question of whether the nonsignatory Exigen plaintiffs' claims fall within the scope of the SPA's arbitration clause was answered in the earlier appeal. The trade secret

theft and defamation claims asserted by the nonsignatory Exigen plaintiffs are indistinguishable from those asserted by the signatory Exigen plaintiffs. In the earlier appeal, we concluded that the claims in the operative complaint fall within the scope of the SPA's broadly worded arbitration clause, at least as to the signatories to the SPA. That conclusion applies here as well with respect to the nonsignatory Exigen plaintiffs.

Because the application of equitable estoppel principles supports compelling the nonsignatory Exigen plaintiffs to arbitrate their claims against Genesys, we need not address other equitable theories offered by Genesys to justify the same relief, including the contention that the nonsignatory Exigen plaintiffs are alter egos of the signatory Exigen plaintiffs.[5]

3. *Section 1281.2(c)*

Under section 1281.2, a court is required to order parties to arbitration if it determines that the parties agreed to arbitrate the controversy—unless an exception applies. One such exception is specified in section 1281.2(c) when there is pending litigation with a third party that creates the possibility of conflicting rulings on common factual or legal issues. Here, the trial court applied the third-party litigation exception under section 1281.2(c) and ordered all the parties to litigate their claims in the judicial forum in order to avoid the possibility of conflicting rulings in the arbitration and the court action. Genesys contends the trial court erred in applying section 1281.2(c).

In light of our conclusion that the nonsignatory Exigen plaintiffs are required to arbitrate their claims, they are not "third parties" within the meaning of section 1281.2(c).

---

[5]During the course of this appeal, Genesys requested judicial notice of various bankruptcy court filings relating to Exigen (USA), Inc., purportedly to support Genesys's alter ego theory and to demonstrate that the claims asserted in this action are intertwined with and dependent upon the SPA. Ordinarily, we do not take judicial notice of evidence not presented to the trial court unless an exceptional circumstance exists, such as when the evidence renders the appeal moot. (See *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3.) No exceptional circumstances apply that would justify our consideration of the new evidence. In any event, the proffered materials are irrelevant to the direct benefits theory of equitable estoppel on which our decision is based. Accordingly, the judicial notice request is denied.

(See *Rowe v. Exline, supra,* 153 Cal.App.4th at p. 1290.) Accordingly, section 1281.2(c) does not apply to this case as a matter of law. It is therefore unnecessary to consider Genesys's alternative contention that section 1281.2(c) is superseded by provisions governing international commercial arbitrations (§ 1297.11 et seq.).

DISPOSITION

The order denying the renewed motion to compel arbitration is reversed. The trial court is directed to enter a new and different order granting the renewed motion to compel arbitration. Genesys shall recover its costs on appeal.

_____
McGuiness, P.J.

We concur:

_____
Pollak, J.

_____
Siggins, J.